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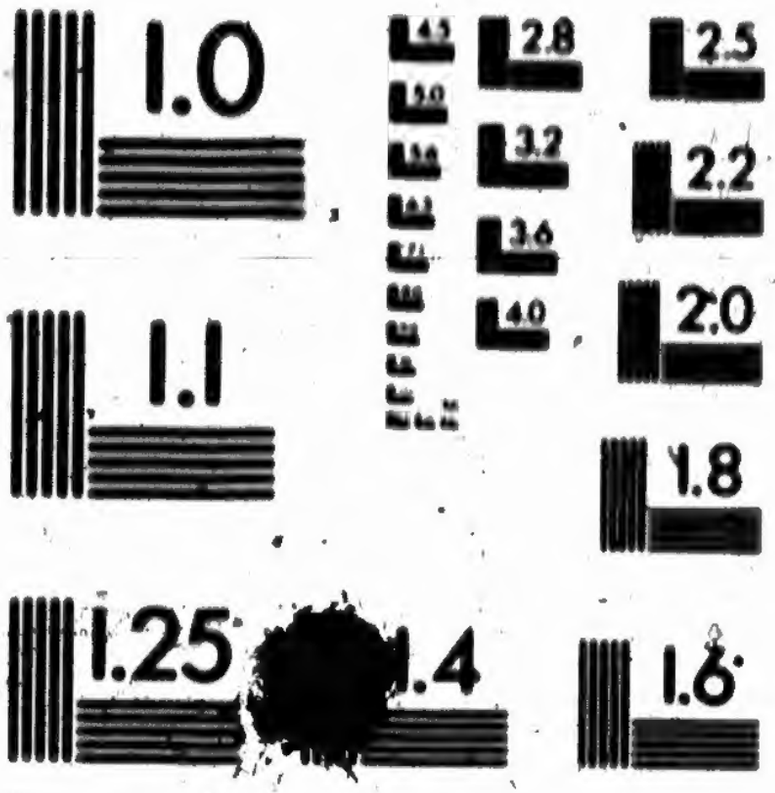

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CASES. COURT OF KING'S BENCH N. - TAYLOR - YORK 1824

340.

CASES

ARGUED AND DETERMINED

IN THE COURT OF KING'S BENCH

At YORK, &c. &c.

CASES

ARGUED AND DETERMINED

IN THE COURT OF KING'S BENCH

YORK, UPPER CANADA,

IN

TRINITY TERM:

IN THE FOURTH YEAR OF THE REIGN OF GEO. IV.

No. I.

JUDGES.

THE HON. W. D. POWELL, *Chief Justice.*
THE HON. WILLIAM CAMPBELL.
THE HON. D'ARCY BOULTON.

JOHN B. ROBINSON, Esq. *Attorney General.*
HENRY J. BOULTON, Esq. *Solicitor General.*

BY THOMAS TAYLOR, Esq.

Printed by CHARLES POTHERGILL, at the U. C. Gazette-Office,
YORK.

1824.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF KING'S BENCH,

YORK, &c.

MEMORANDA.

THOMAS TAYLOR, Esq. was appointed Reporter to this Court, during the last Vacation, under the Provincial Statute, 4 *Geo. IV. C.* 3.

MR. JUSTICE CAMPBELL was Absent during the whole of this Term, from Indisposition.

1823.

July 7th.

JAMES ROY, AND JULIA DUVAL,

against

JOSEPH DELAY.

Where a rule to shew cause why an attachment should not issue against an Attorney for non-payment of monies recovered for his Client, had lapsed; the Court refused to grant a new rule without a fresh affidavit, stating that the money was still unpaid.

WASHBURN obtained a Rule last Term to shew cause why an attachment should not issue against ———— one, &c. upon an affidavit, stating the receipt, non-payment, and refusal to pay, certain monies received by him from the defendant in this action, to the use of the plaintiffs; and now he stated to the Court, that

1823.

JAMES ROY and JULIA DUVAL against JOS. DELAY

the former rule had lapsed, and moved for another rule, *nisi*, upon the former affidavit; *sed per Cur.*

It appears, *prima facie*, from the rule not having been served, that the demand may have been satisfied: a rule to shew cause cannot issue, without a fresh affidavit, stating that the money sought to be recovered is still unpaid.

Rule granted upon Affidavit made.

July 11th.

WILLIAMS *Against* CROSBY.

The Court will not grant a peremptory rule for the discharge of an insolvent prisoner without an affidavit that no interrogatories had been filed by the plaintiff.

MACAULEY applied for an order to discharge the defendant out of custody, upon an affidavit, stating that the Order of Court obtained under the provincial statute* for payment of five shillings, currency, per week, to the defendant, a prisoner in execution, had not been complied with.

BOULTON, Justice, (absente POWELL, C. J.) There must be an affidavit that no interrogatories have been filed by the plaintiff, or the application must be for a rule *nisi*.†

Rule nisi granted.

THE KING

*Prov. Stat. 45 Geo. III. † Prov. Stat. 2. Geo. IV. c. 8.

THE KING *Against* HARRIS.

1823.

July 14th.

Quere, Whether the court will award a mandamus to the Treasurer of a District in this Province.

ROLPH obtained a rule last Term to shew cause why a Mandamus should not issue to the Treasurer of the district of London, directing him to pay several sums of money to the Gaoler of the district, under the orders of the Justices in Sessions. The affidavit in support of the application stated the issuing of several orders by the Justices in Sessions to John Harris the treasurer, requiring him to pay several sums to Beaupre, the gaoler; the presenting of those orders to Harris, his refusal to pay them, on the ground of there not being any money in the treasury, and the payment of several orders of a date posterior to, and which were presented after those of Beaupre.

BOULTON, *Solicitor General*, now shewed cause:—He contended, that the only grounds upon which a Mandamus can issue are, that the party has no other legal or appropriate remedy, or that there is no court, except the Superior Court, competent to correct the acts complained of:—That in this case, the legal and proper remedy was by indictment, or by application to the Magistrates in Sessions, to whom the treasurer was amenable for his conduct, and who had ample means of correcting him by re-

1828.

THE KING against MARSH.

moval: his accounts were audited and allowed by them, and it would be unreasonable that he should be proceeded against by mandamus, in a matter respecting those accounts, by any other court; he is the officer of the sessions, having the custody of monies which are subject to their disposal only:—That these positions are borne out by all the cases, none of which are contrary to, many bearing a strong analogy to, and several, directly in point with, the present. In Doctor Walker's case, Lord Hardwicke says,* "Can it be said that ever a Mandmus went to an officer of an inferior court to compel him to do his office? No, sure, for if the inferior officer will not do his duty, the judge of the inferior court must turn him out." In The King against Bristow,† Lord Kenyon says, "This court have no difficulty, upon a proper case laid before them, in granting a mandamus to justices to make an order, when they refuse to do their duty; but it would be descending too low, to grant a mandamus to inferior officers to obey that order:—We might as well issue such a writ to a constable, or other ministerial officer, to compel him to execute a warrant directed to him, as to grant this application to the treasurer, to obey the order in question. It was once indeed, made a question, whether the disobedience of an order of justice was an indictable

* Cases temp. Hardwicke, 218. † 6. T. R. 108.

1823.

The King against Hanson.

offence; but since the case of The King against Robinson, that point has not been doubted:—The prosecutors must pursue the ordinary remedy in this case by indictment:" and my Lord Bacon says, "But, though these kind of writs are daily awarded to judges of courts to give judgment, or to proceed in the execution of their authority, yet are they never granted in aid of a jurisdiction, but only to enforce the execution of it; nor are they ever granted where there is another proper remedy; and therefore will not ly to an officer of an inferior court, as to a serjeant at mace, an apparitor, &c. to compel them to execute their duty, for these are servants to the respective courts, and punishable by the judges of them; and for the superior court to interfere in obliging such inferior officers, would be to usurp their authority."*

That supposing this treasurer to be an officer to whom a mandamus could issue, the affidavit to ground the application was defective, in as much as it is not sworn that the treasurer had money in his hands, when the orders were presented, and that the orders themselves, should have been annexed, and not a schedule; and the tresurer has sworn that he had no money.

* Bac. Abr. Tit. Mandamus, 310.

1823.

The King against Harris.

Boulton, Justice.—The affidavits are certainly too confined; in a similar application to the present, in England, I recollect that fact was expressly sworn to.

The magistrates, if necessary, can coerce this treasurer: no neglect is shewn upon his part:—It is merely sworn that an order was issued, and that he did not pay it. He has produced his accounts, which shew he has no money in his hands, and they are supported by affidavit.—The court will not therefore grant a mandamus to compel him to do what is physically impossible; nor will they order him to pay de bonis propriis.

Macaulay, contra.—The object of this application is not duly considered by the arguments on the other side: if the treasurer had no money in his hands, he should return that fact, upon which issue might be taken, and that issue might be tried by a Jury. If the treasurer does not make such a return to the mandamus as will satisfy the court, he will be attached, and the object of the attachment will be, not to do that which is physically impossible, but to punish him for contempt of the process of this court. The treasurer is upon a different footing here to that which he is upon in England: he is here appointed un-

1823.

THE KING AGAINST HANSON.

der the sanction of an Act of the Legislature; his duties are chalked out by statute.—When orders for payment of money are brought to him, it is his duty to pay them out of the first monies which come to his hands: he is not to pay subsequent orders before prior ones. In the affidavits in support of this motion, it is distinctly stated, that he has made several payments upon orders issued after those of the gaoler. If the magistrates have neglected to exert their authority, in compelling the treasurer to perform his duty, this court will interfere:—The case of The King against Bristow is very distinguishable from the present: that was an application from the sessions for a mandamus to the treasurer of a division quarter sessions, from parties who had the means of enforcing their own orders. It is expressly laid down in Kidd, that this court will visit all officers, and here the court will not hesitate to grant a mandamus; issuable facts may be returned upon it, traversed, and tried by a jury.

ROLPH, same side.—The case of The King against Dean inclosure* is in point: That was an application for a mandamus to commissioners of highways appointed by Statute, and

* 2. M. & S. 80.

1823.

The King ag. Hanson.

notwithstanding the quarter sessions had authority, the court of King's Bench interfered, and it was laid down that an indictment against commissioners of an inclosure act, for not obeying an order of sessions, directing them to set out a road, as a public road, would not be such a remedy to the party as would induce the court to refuse an interference by mandamus. In the present case, an indictment or removal of the treasurer would be no remedy to the party; and when the law mentions a legal and specific remedy, it must contemplate one which would assist the party in the recovery of his rights.

Boulton, Sol. Gen. in reply.—The case in Maule and Selwyn is very different to the present; the commissioners there were not inferior officers, but superior in their own court; an appeal lay to the quarter sessions, but as the time had elapsed for that appeal, the court of King's Bench interfered, on the ground that the party would otherwise be without remedy.

There is no reason for considering a treasurer in this country, as bearing a different character to that which he does in England:*—It

* As to the office and duties of a treasurer of a county in England, vide 11 G. 3 c. 20—12 G. 2. c. 29, & 6, 7, 8, 9, 13, cited in Burns' Justice.

1823.

THE KING against HEARNE.

is not necessary that the mode of his appointment should be the same; he is amenable to his own court here as well as there:—If the superior court saw it necessary to interfere with the treasurer, it would be by attachment, a process which the quarter sessions are not empowered to issue for disobedience to their orders. Is there any instance of this writ issuing, to order the performance of an impossibility, and of incarcerating a man for not obeying it? suppose there may have been orders paid subsequent to the presentment of the gaoler's, they were not left with the treasurer, and he is not bound to keep a tablet in his memory of all orders that are issued. The point of law appears from all cases to be clear against thus issuing a mandamus in this case, and no grounds have been shewn why the court should interfere contrary to former determinations.

CHIEF JUSTICE.—This is a beneficial writ prayed by Beaupre the gaoler, to supply the want of any other remedy adequate to his relief: the treasurer is a public officer, declared by statute so to be; he is to receive the public money, to pay the orders of sessions for its disbursement, and to account to the sessions: when the gaoler presented his order, he was told that there were no means; other orders

1833.

THE KING ex rel. BEAUPRE.

have been made upon the treasurer since that of the gaoler, which have been paid; but Beaupre has always been told, that there was no money in the treasury. Upon principle the treasurer is bound to charge the orders as they occur; it would be monstrous that he should be permitted to prefer one person to another at his own caprice; if it is not the law at present, I should hope the legislature would make a statute for the payment of these orders in rotation; under the circumstances of this case, a mandamus appears to me to be the only remedy.—I cannot consider the treasurer as an inferior officer, though he is appointed by the sessions, his duties are set forth by an act of the legislature: if the treasurer had no money upon the presentment of Beaupre's order, he should have been paid out of the first monies which came into the treasury, and the affidavits state, that the deponents verily believe there was money. The true principle for granting a mandamus in the King's Bench [illegible] merely, that there may be some other mode of seeking redress, but that it should be a means competent to the party. It has been contended that this gaoler should proceed by indictment, but that would not be an adequate remedy to him: the treasurer may be removed, and his securities may be resorted to, by the justices, but still this would not relieve the applicant; his

1823.

The King against Hamilton.

demand upon the treasury remains as long as there is money in the treasury, or money due to the treasury:—The affidavit of the treasurer contains by any direct assertion, that he had not the means of payment at the time of presenting the order, or that he has not had the means since; it admits, that subsequent to the presentment of Beaupre's order, a more recent order has been presented and paid. The opinion which I formed upon the former argument of this case is not altered, but rather strengthened: an indictment is not an adequate remedy here, and I think the mandamus should issue.

Boulton, Justice.—There are two points to be considered in this application: First, whether the treasurer of a district is an officer to whom a mandamus may issue: And, secondly, if he is so, whether the affidavits in this case are sufficient to warrant the extraordinary interference of this court:—As to the first point, the cases say that a mandamus is always refused where there is a specific remedy; this is laid down in Douglas as well as the term reports: in the cases there reported the subject of the application was a treasurer, here it is the same—I can see no difference in the law, no difference in its application; every authority satisfies me that the writ cannot issue; the only pretence for a different decision, is the case in

1823.

THE KING against MARRIS.

Maule and Selwyn, but it does not apply; that was respecting an original appointment; the commissioners were not inferior officers. As to the second point, it is not sworn in the affidavits in support of this application, that the treasurer has money in his hands:—It appears to me that it would be a hardship upon him to issue this writ, unless it was positively sworn that he had funds. In a similar application to the present, to the Court of King's Bench, in England, where that fact was sworn to, the writ was granted without opposition; that case, therefore, furnished but little authority.—My first impression on this application was, that the writ might issue, but upon considering the law, and looking into the affidavits, I am satisfied that a mandamus should not be awarded.

The court being divided, Rolph took nothing by his motion.

July 16th.

WILLIAMS *against* CROSBY.

It is not sufficient that an affidavit to ground the detention of a prisoner who has applied for his discharge for non-payment of his weekly allowance, state his being possessed of property, but it must shew that he has secreted it, or fraudulently parted with it, and after such allowance has been paid, if the plaintiff discontinue it, he must have affidavits to produce in court, to justify such discontinuance at the time the defendant moves for his discharge.

RIDOUT shewed cause against the rule nisi obtained this term, for the discharge of the defendant, an insolvent debtor, upon affidavit,

stating that the defendant was possessed of land in the township of King, which he became entitled to, subsequent to his imprisonment at the suit of the plaintiff. This affidavit had been sworn above a year ago, and had not hitherto been made use of by the plaintiff, who had paid the defendant the weekly allowance ordered by the court, for about seventy weeks, and then discontinued it.

This prisoner cannot be discharged under the statute,* until he answers the interrogatories to be filed by the plaintiff:—The words of the statute are, "That when and so often as any prisoner or prisoners in custody, and charged in execution, for debt, in any civil suit, shall apply to the court whence such process or execution issued, either to be discharged or allowed a weekly maintenance, by reason of any alledged insolvency, it shall and may be lawful for the plaintiff or plaintiffs, at whose suit such prisoner is detained, his, her, or their attorney, to file such interrogatories as he, she, or they, shall be advised, or think expedient, touching or concerning, or for the purpose of discovering any property or credits which the prisoner may be possessed of, or which he or she may be suspected of having

* Provincial Statute, 2. Geo. 4. c. 8.

1823.

WILLIAMS against CROSBY.

secreted, or fraudulently parted with, which interrogatories the prisoner is required to answer upon oath:—That after such interrogatories shall have been filed, and a copy thereof delivered to said prisoner, his or her attorney, said prisoner shall not receive any further benefit from his or her application; and the orders or other proceedings thereon shall be stayed until the prisoner shall have fully answered the same," &c.—It is immaterial, according to the words of this statute, at what time he came into the property. He is possessed of land, and not being the insolvent person whom the statute contemplates, the plaintiff is entitled to examine him upon interrogatories, and it is contrary to the intention of the statute that he should be discharged until he has an opportunity of doing so; the principle of this statute is the same with that of the Lords' Act.

MACAULEY and WASHBURN, contra.—It is not sufficient now that it is sworn that the prisoner has property; it must also be sworn that he has secreted it, or fraudulently parted with it. Plaintiffs cannot be permitted to pocket up affidavits for a length of time, and then produce them to prevent the discharge of a prisoner.

CHIEF JUSTICE.—It appears that the weekly

allowance has been paid for a length of time, and is now discontinued. The plaintiff cannot cease this payment without shewing that the defendant has, subsequent to the order for the allowance, "concealed, fraudulently parted with, or made away with, his property."—If this prisoner should be released the debt is not discharged: the plaintiff may resort to the property:—Before he discontinued the payment, he should have had his affidavits of these facts ready. The affidavit you have may shew property to have come to him since his imprisonment, but shews no secretion of it, or that it has procured him a loaf of bread. A man is put into gaol, who swears he is worth nothing: after laying in gaol for some time, he procures an order for five shillings per week, which is paid for more than a year, and is then discontinued: he applies for his discharge, and then the plaintiff produces affidavits to shew that property has come to him.——The prisoner must be discharged.

Per Curiam.

Rule absolute.

NICHALL.

1823.

July 12th.

NICHALL and another, Surviving Executors, *Against* WILLIAMS.

Where one of three executors is deceased, and the survivors bring an action in right of their testator, the declaration must state that payment has not been made to the deceased executor.

THE Declaration in this case was for goods sold, and upon the common money counts; the breach stated that the defendant, not regarding his promises, &c. but contriving, &c. to defraud the testator in his life time, and the said William Nichall and Allan McPherson, since his death, in this respect, had not paid the several sums of money, &c. to Testator in his life time, or to said James Nichall and Allan McPherson, executors as aforesaid, or to any of them, (without any averment of non-payment to the deceased executor). To this declaration the defendant demurred generally.

MACAULEY, in support of the demurrer.—No notice is taken in this declaration of the deceased executor; he is not even named:—There should have been an averment according to the forms laid down, that no payment was made to the deceased executor during his life.

BALDWIN and WASHBURN, contra.—This is not like the case of a deceased partner. In law, a negation of payment to one executor is a negation as to all.

1821.

NICHARD and another against WILLIAMS.

CHIEF JUSTICE.—Each of the executors may receive money. To shew that the defendant is still indebted, you should aver that the third executor has not been paid.

Per Curiam.

Leave to amend upon payment of Costs.

THE KING *Against* JOHN McINTYRE and ALEXANDER MACKENZIE, ESQUIRES.

July 18th.

An attachment will issue against commissioners of a court of requests, who try a cause in which they are interested.

BOULTON, Solicitor General, had obtained a rule in Hilary Term last, calling upon Alexander Fraser, Alexander McMartin, John McIntyre, and Alexander McKenzie, Esquires, Commissioners of His Majesty's Court of Requests, held at Williamstown, in and for the county of Glengary, to shew cause why an attachment should not be issued against them for having illegally and corruptly given judgment in the said court against Alexander Wood, at the suit of the elders and committee of the Church of Williamstown, and issuing execution thereon;—The facts upon which the rule was granted, as stated upon affidavit were, that Alexander Wood having, with several others,

1823.

THE KING against J. McIntyre and A. McKenzie

signed a subscription paper or agreement for the allowance of six dollars each, per annum, for the support of a Presbyterian minister, who was to have come from Scotland, and having refused to pay the same, in consequence of no minister having arrived agreeable to the terms, as he conceived, of the agreement; he, said Wood, was proceeded against to judgment and execution, before said Commissioners of the Court of Requests, for the sum of one pound, and costs amounting to seven shillings and six pence: that John McIntyre and Alexander McKenzie, who gave judgment against said Wood, were interested in the event of the said suit; the former being one of the elders, to whom the promise, if any in the said agreement or subscription paper was made, and the latter being personally bound to pay the salary of the minister then officiating.—It was further stated upon affidavit, that goods and chattels of Wood of the value of twenty-two pounds were sold to satisfy the amount of the execution, being one pound seven shillings only.—It was also sworn that the church was indifferently designated Williamstown or Lancaster.

MACAULEY now shewed cause.—An attachment cannot issue against magistrates acting judicially, unless actual corruption is shewn.—In this case, the parties are respectable per-

1823.

THE KING against J. McIlvrem and J. McKinnon.

sons, who could have no corrupt motive in what they had done. In the judgment of the court of requests, the plaintiffs are entitled the Committee of the Church of Lancaster; and in the rule nisi granted by this court, they are styled the Committee and Elders of the Church of Williamstown, a variance which will prevent the issuing of the attachment. In a strict legal proceeding, as the present is, the names of parties must be correctly stated, and though it is sworn that the elders and committee are indiscriminately designated as of Williamstown or Lancaster, that is not sufficient to cure the defect; as to the value of the property taken by the constable, to satisfy the execution;—He has sworn that Wood told him he had no property, except a mare and two stacks of oats. —[CHIEF JUSTICE.—That is immaterial, the complaint against the justices cannot go further than issuing the execution.]—McMartin has sworn that several parties were sued upon the same agreement or subscription paper, and that they had a full opportunity of making their defence; and if Wood did not chuse to do so, upon a mere surmise that his defence would not be attended to, it was his own fault. There is no evidence of corruption in this case; the parties were mere agents, and not bound for the contracts of others;—They may have erred, but certainly not from corrupt motives.

1823.

THE KING against J. McIntyre and A. McKenzie

BOULTON, Solicitor General, contra.—In the affidavit to ground this application it is positively sworn that one of the magistrates (McIntyre) was one of the elders, plaintiff on the action upon which he sat and gave judgment; and that another, (McKenzie) was personally bound to pay the salary to the present officiating minister. Wood was well entitled to refuse payment of the subscription, as the terms were not complied with, and the refusal of a copy of the judgment by the magistrates, upon the first application was highly improper:—They are certainly amenable to the common law as for corruption. In the case reported in 1st Lord Raymond, an attachment issued against a magistrate for giving judgment in favour of his own Lessee.

CHIEF JUSTICE—Wood seems to have had grounds for refusing his subscription, as no clergyman came from Scotland to officiate under the agreement. One of the magistrates who was concerned in this matter very properly withdrew from the bench:—A man must have no conscience at all, who could sit in a cause in which he was concerned.—There may not have been actual corruption, but the case comes under the law which is anxious to prevent it.

Per Curiam. An attachment must issue against John M'Intyre and Alexander McKenzie, Esqrs.

1823.

July 16th.

BROOKE *against* ARNOLD.

Where the plaintiff indorsee of a promissory note, overdue upon demand, had taken it 2 years after its date, and was ignorant of an agreement entered into between the holder from whom he took it, and the defendant (the maker) that the same should be set off against a bond of which the defendant was obligee, and the holder the obligor.—The court held that a plea stating these facts, was good upon general demurrer.

THE plaintiff declared in assumpsit, as indorsee of a promissory note made by the defendant, and upon the common money counts, and laid his damages at £——. The defendant pleaded to the first count: 1st, That John Arnold, in the first count, mentioned after the making of the note by Thomas, the defendant, and before the same came to the hands and possession of the plaintiff, to wit, on the 6th day of September, 1819, indorsed the note in blank, and delivered the same to one Allan Napier McNabb, and authorised the said Allan to demand and have of, and from the defendant the said sum of money in the said note specified, according, &c.; of which said indorsement and delivery, the defendant afterwards, to wit, on the day and year, &c. had notice:—That after the making of said note, and before the same came to the hands and possession of the said McNabb, so indorsed as aforesaid, to wit, on the 4th day of September, 1817, said McNabb executed a bond to the defendant in the penal sum of £450 conditioned for the payment of £265 5s. 0d. by three instalments,

1823.

McNabb against Arnold.

&c. :—That at the time when said note, so indorsed and delivered to McNabb by John Arnold, and became the property of McNabb for the purposes aforesaid, to wit, on the 6th day of September, 1819, at York, &c. there was and still is due and owing upon the said writing obligatory by the condition thereof for the second instalment in the said condition mentioned, the sum of £100, which said last mentioned sum of money so due and owing from McNabb to the defendant, greatly exceeds the amount of principal and interest due on said note, &c. That afterwards, and while the said note, so indorsed as aforesaid, remained and continued in the hands, and was the property of McNabb, to wit, on the day, &c.: the defendant, at the special instance and request of McNabb in that behalf, consented and agreed that the sum of money in the said note specified (said note so indorsed as aforesaid, being still held and owned by McNabb as aforesaid,) should be set off and allowed to McNabb for and on account of, and in satisfaction of so much money so due and owing by McNabb to the defendant upon the said writing obligatory, by the condition thereof as aforesaid, of all which premises the plaintiff afterwards, and before the said note so indorsed as aforesaid, came to his hands as in the plea thereinafter mentioned, to wit, at York, &c. had notice :—That afterwards, and

1823.

Bar. as against Arnold.

before said sum of money so due and owing from McNabb to the defendant, upon said writing obligatory, by the condition thereof, or any part thereof had been in any other way paid, discharged or satisfied, and whilst the same remained in arrear and wholly due and unsatisfied, and long after the said note became due and payable; to wit, on the day, &c. McNabb and the plaintiff well knowing the premises, but wickedly contriving, &c. and to force the defendant unjustly again to pay said sum of money in said note specified, and to defraud him of his right to set off the same against the aforesaid sum of money so due and owing from McNabb to the defendant on the aforesaid writing obligatory by the condition thereof, did agree together that McNabb should deliver the said note so indorsed in blank to the plaintiff, for the purpose of enabling him to sue and prosecute the defendant for the said sum of money in said note specified, by virtue of said indorsement thereon aforesaid, and the plaintiff did then and there accept the said note so indorsed from McNabb, for the purposes aforesaid, then and there well knowing, &c. by which means, and by no other, the plaintiff became and was the holder of the said note.—Traverses that John Arnold, by the said indorsement of the said note, ordered and ap-

1833.

Barrow against Thomas.

pointed the said sum of money in the said note specified, to be paid to the plaintiff on delivered the said note so indorsed to the plaintiff. 2dly. That the promissory note so indorsed in blank, came to the hands and possession of the plaintiff by the delivery of McNabb, after, and not before the agreement that the same should be set off against the bond of McNabb, and out of which said sum of money so due and owing from McNabb to the defendant, the defendant is ready and willing, and offers to set off and allow to the plaintiff the said sum of money so due and owing from the defendant in the said promissory note, according, &c.—Traversing so in the first plea: And, 3dly General issue as to the second count in the declaration.

To this plea the plaintiff demurred generally.

Barrow, in support of the demurrer.—This plea is an attempt to set off a bond debt due to the defendant by a third person, against a note due by the defendant to the plaintiff in this action; if this could be done, the plaintiff would be unjustly deprived of taking those exceptions to this bond which the obligee might take in an action against him by the obligee: McNabb should have delivered this note up to Thomas

1831.

Bevan v. Lewis.

fraud, the defendant, the obligee in the bond, and have had the action of fraud, or he might have brought his action; but this attempt to bind the plaintiff by an agreement to which he was not necessary or privy, cannot be supported.—This plea charges the plaintiff with an intention to deprive the defendant of a right of set off, a charge so vague and uncertain that the plaintiff cannot be called upon to answer it.—The defendant, by his plea, acknowledges every circumstance necessary for the plaintiff to support his action: the making of the note by the defendant, the indorsement in blank by the payee, and the subsequent delivery to the plaintiff.—If the court should support this plea they would deprive negotiable instruments of their credit, if not entirely destroy their negotiability, for who would take them if they were made subject to agreements entered into previous to their transfer; Would the bank here be concluded by agreements, such as it here attempted to be set up, after a note had passed through a dozen hands? A note indorsed in blank stands upon the same footing as one payable to bearer, is transferable by mere delivery, and can be recovered upon, though it may have been stolen by a prior holder, as laid down in Douglas's Reports.*—Supposing even that the plaintiff may

* Peacock, v. Rhodes, Doug. 611. 633.

1823.

Brooke against Annesley.

have come to this note unlikely, it might be a consideration for a court of equity, but a plea in bar must contain matter of law, as laid down in Chitty.* It would be idle and absurd to contend that the plaintiff's demand in this action could be destroyed by an agreement for a set off, of which he had no knowledge. The second plea offers to set off this note against a bond due to the defendant by a third person, and it appears to me, can only be intended to puzzle with new matter, for it is clearly established and well known, that to entitle a defendant to a set off, the debts must be mutual, but in this plea he offers in fact, to give credit to McNabb, a stranger to the set on. An executor or administrator cannot set off, nor can a trustee.—[Chief Justice.—A trustee has no property.]—Nor can any person set off unless the legal title to that which he attempts to set off may be gone into; if this plea were allowed, the plaintiff would be concluded by an instrument to which he has no access. In the case of Wake against Tinkler,† the defendant attempted to set off a bond executed by the plaintiff to a third person, and assigned by him to defendant; but, notwithstanding the equity of that case, the court determined against the plea, observing that they had nothing to do with other

* Chitty on Pleading, v. 7. † 16. E. R. 44.

1823.

Brooke against Ashmore.

their legal rights.—It is impossible to make this plaintiff a party to the bond.—It is an attempt to apply to the equity of the court; but the plea is bad inasmuch as no legal right is shewn. The traverse which concludes the plea is also bad, for nothing can be traversed which is matter of law, and the court will not allow this to pass without observation; for an indorsement is an order in law by the indorser to pay the holder.—There is no matter shewn in this plea, upon which issue can be taken; it offers that as a set off which cannot be the subject of one.

Boulton, Solicitor General, contra.—The object of this plea is not to set up a cross demand. The defence is grounded in fraud, which fraud is clearly and obviously set out in the pleadings: the plea charges a direct fraud and conspiracy: A. has a demand against B. for a note payable on demand, which is not indorsed until a great length of time after its date; after it has been agreed between them that this note should be taken as a set off to a bond, A. agrees with a third person (Brooke) to deliver this note to him for the express purpose of defeating this agreement; Brooke, by the demurrer, admits these circumstances, which amount to a fraud and conspiracy; a complete answer to the action, for no fraud-

1828.

[illegible]

[illegible] this transaction can be a ground of action. The defendant does not seek an equitable right, but charges a fraud in which the plaintiff is concerned. The general issue in this case would have been too narrow; it was necessary that the circumstances should be pleaded specially: the plea states the agreement between the defendant and McNabb, and Brooks's knowledge of it, and that he wickedly contriving to injure and defraud the defendant, and to force him unjustly again to pay the sum specified in the note, and defraud him of his right to set off the same against the money due upon McNabb's bond, agreed with McNabb for the delivery of the note to him for the purpose of enabling him to sue. If this had been an indictment for a conspiracy, and McNabb had been joined, these words would have supported a conviction. The distinction between taking a note before or after it becomes payable is well known.—[Chief Justice.—A person taking such a note takes it with all exceptions.]—This note was dated in 1817, and not indorsed until two years afterwards. McNabb could not have recovered against Arnold; the mutual agreement would have rendered the note invalid, which was indorsed such a length of time after it was payable, even though the indorsee had been ignorant of such agreement.—[Chief Justice.—This note having been

1823.

Ram. ex. against Assumpsit.

[illegible] two years after it was due, brings the case within the determination in the 3d term reports *]—Here its indorsement at so long a period after date, places Brooke, the plaintiff, in the situation of McNabb, who could not have prevented a set off:—It was the plaintiff's bounden duty to have enquired respecting this note; he is a particeps criminis upon the record, and cannot recover.—[Chief Justice.—It did not appear to have been dishonoured at the time of the delivery to Brooke.]—In the case of Banks against Colwell, which was an action by an indorsee upon a note payable upon demand, tried before Mr. Justice Buller, the defendant was admitted to give in evidence that the note had been indorsed to the plaintiff, a year and an half after date, and to impeach the consideration by shewing that the note had originally been given for smuggled goods; and though no privity, had been brought home to the plaintiff, the learned Judge nonsuited him:—In this case much more than a reasonable time had elapsed between the date and transfer of the note; it was high time for the plaintiff to look out, high time that his distrust should have been excited. As to the objection made to the traverse, there can be no doubt

* 3. T. R. 80.

1823.

Brooke against Arnold.

but that that part of the plea is good, at any rate, upon special demurrer.

Chief Justice.—This is an action of assumpsit, and the plea much out of the common course: it cannot be concealed, that McNabb had the possession of the note upon which the action is brought, and that the contents of it were due to him as assignee of the payee; that he had former transactions with Arnold, the defendant, with whom he entered into an agreement that the amount of this note should be set off against the second instalment of a bond, of which, Arnold, the defendant, was the obligee, and McNabb, the obligor: that this agreement took place before the note was negociated to Brooke, the plaintiff, and that of this agreement Brooke had notice; the equity, or right of set off, which Arnold, the defendant had, would follow the note in the hands of Brooke; with a knowledge of that right he could not claim payment: it is admitted by the demurrer that he had that knowledge: it is also admitted that the note was transferred about two years after it came to the hands of McNabb.—Under these circumstances I consider that the plea is good.

Per Curiam. *Judgment for the Defendant.*

1823.

July 14th.

ROBERTS *Against* HASLETON.

Where one of the bail to the Sheriff had in consequence of the defendant's leaving the Province, and under an apprehension that he would not return to defend the suit, had given a cognovit in his own name to the plaintiff. The court upon an affidavit of merits stayed the proceedings upon the cognovit.

WASHBURN obtained a rule this term, calling upon the plaintiff to shew cause (upon an affidavit swearing to merits) why the proceedings upon a cognovit given by Brundige, one of the defendant's bail to the sheriff, should not be stayed until a trial of such merits could be had, upon payment of costs incurred by proceedings against the sheriff's bail, leaving the judgment by confession, which he gave, as a security to the plaintiff, pleading issuably, and going to trial at the next Niagara Assizes; and now,

MACAULEY shewed cause.—A rule *nisi* was obtained in this case in Michaelmas Term last, which the party applying has suffered to lapse; after this laches and indifference he should not be permitted to apply again: several terms have elapsed since the plaintiff and defendant in this motion were parties in a suit:—The plaintiff held the defendant to bail: he gave bail to the sheriff and left the Province:—One of the bail, (Brundige,) the person in whose behalf this application is made, voluntarily

1833.

Rousom against Hamilton.

gave his own cognovit, undertaking to bring no writ of error, and some time afterwards, the defendant, who had left the Province, returned, put in special bail long after the time allowed by the rules of the court, waits for several days before he gives notice; and, after all this irregularity, an application is made to stay proceedings upon this cognovit, and that the defendant may go to trial; the motion, affidavits, and rule, are altogether foreign to this judgment:—The confession was voluntarily given by Brundige: He obtained time for the payment of the debt, and if the defendant has left him in the lurch he must resort to him.—The rule, though entitled in the cause of Haseleton and Roberts, has nothing to do with it, but is in favour of another person, against whom judgment has been entered. The defendant did not enter bail in time: he was too late in perfecting it; too late in his notice of justification; and he is certainly now too late in his application to set aside this judgment.—It is laid down in Willes' Reports, that if application is made to stay proceedings upon a bail bond, the rule must be entitled in the action upon the bail bond; here the motion is made in an action altogether foreign to the judgment:—The writ was returnable in Trinity Term last, the 2d of July; on the 17th of July, after the cognovit was given by Brundige, and after the

Brundige against Macauley.

expiration of the time for putting in bail, it was put in, and last November we were entitled to execution against Brundige upon his cognovit.

Washbourne, contra.—The rule for putting in bail within four days after the return of the writ, is intended of the first four sitting days; bail cannot be permitted to fix a defendant by signing a cognovit:—The defendant had, until the eighth day of July, to put in bail, and it was actually put in on the seventeenth; notice was given, and an offer made to pay the costs accrued by the neglect, but the plaintiff having frightened Brundige into a cognovit, refused to relinquish his advantage. The case in the fourth term reports* shews that the affidavit in support of this application has been properly entitled; the former rule lapsed in consequence of the absence of the counsel:—The affidavit of merits is a sufficient ground for this application, and the statue of Anne† does not confine the relief to be given to a defendant or the bail, to an action upon the bail bond alone, but extends it to any other security to be taken from such bail.

Macauley, in reply.—Neither the defendant or his bail are within the equity of this statute;

* 4 T. R. 658. † 4 & 5 Anne, c. 16 S. 20.

1823.

Bingham against Hanover.

notice should have been given that the defendant would put in, and perfect bail on some certain day: the bail should have been justified, and the bail piece filed: the bail should be entered in the first four days; it should have been entered by the fourth of July, but it appears by the affidavit that it was not entered until the seventeenth; no notice was given until the twenty-second, when it was too late to get to trial at the following assizes, by which the plaintiff lost a trial: the absence of counsel cannot be taken into consideration, the attorney was present: twelve months after the return of the writ, an application is made to the equity of the court, which is, I conceive, with the plaintiff, and who is entitled to their protection:—The cases in Willes, and other cases are of irregular judgments, but here is a judgment upon the parties cognovit fairly obtained.

Chief Justice.—Where the parties swear to merits, it is usual to grant relief to the bail:—The party appears to me to be entitled to the equity of the statute:—The judgment was taken as upon a bail bond. It must be stayed, standing as a security for the event of the trial.

Per Curiam.

Rule absolute.

1823.

July term.

CRAMER *against* NELLES.

When the judgment of a Court of Requests had been set aside upon the application of the defendant without any interference on the part of the plaintiff, the court refused to grant an attachment against him for non-payment of the costs of removing the proceedings. As to costs in error, see Gilbert vs. Gladstone, 12 E. R. 688.

IN this case proceedings and judgments of the Court of Requests for the Gore district, had in a former term been removed into this court by certiorari, at the instance of the defendant, against whom judgment has been entered in their court, and these proceedings were by an order of this court set aside with costs, and now,

SMALL moved for an attachment against the plaintiff, Cramer, for non-payment of the same upon the usual affidavit.—He contended that the defendant was entitled to the costs of the certiorari, and of setting aside the proceedings, and cited the statute of Henry the Eighth as in favour of the application:—The defendant had not opposed the issuing the certiorari, or the setting aside the proceedings of the commissioners thereupon.

CHIEF JUSTICE.—In this case a certiorari has issued to magistrates, and their proceedings have been set aside:—The plaintiff, who never heard of this certiorari, is called upon to pay twelve pounds costs:—I cannot bring my mind to issue an attachment in this case.

Per Curiam. *Attachment Refused.*

1822.

April 8th.

ELIZABETH SAUNDERS *against* GEORGE PLAYTER.

The court will not, on the ex parte affidavit of the plaintiff, obtain the leave of the Provincial Secretary, upon which an examination with witnesses should be taken, the defendant, or the authorities, before the same declaration filed.

BALDWIN obtained a rule this term to shew cause why the plaintiff should not be at liberty to examine Robert Emered as a witness in this cause, upon the usual affidavit of his being about to leave the Province, (the declaration had not been filed in the cause,) and now,

DOUTRE, Solicitor General, shewed cause. —This application is out of season: The party making the affidavit is a stranger to the action, which is objectionable in limine:—It would be unjust and absurd to examine witnesses before there was a charge in court, for the defendant to answer.—There is no instance of a commission issuing to examine witnesses before declaration filed: it would be contrary to common sense: the defendant could not cross-examine him, having no knowledge of the charge to be brought against him:—When acquainted with the nature of the demand, he may perhaps give up his defence.

BALDWIN, contra.—The determination in this case will settle an important point of

1823.

Examination under Oath.

practice:—This application would, under the old statute* be granted as of course; and the law is not altered by the new one, except that the examination is to be granted upon hearing the parties upon motion:—The defendant will know the questions to be propounded, and will have every opportunity of cross-examination. The object of this part of the statute† is to prevent the inconvenience of parties going to trial without evidence: the words of the clause are, "in any action now pending, or hereafter to be brought:"—The equitable construction of it is, that as soon as an action is brought, a commission may issue to prevent loss of evidence. The affidavit shews all the necessary facts; and as to the objection of the party being a stranger who makes the affidavit, it is natural for him, and his duty as guardian to the plaintiff, to assist in this application.

Chief Justice.—The party cannot be called into court without knowing for what, before declaration filed:—I can conceive no propriety in an application like the present: In England, indeed, a party may obtain a commission from the Court of Chancery to examine witnesses,

* Provincial Statute, 34. Geo. 3. C. 2. S. 23.
† 2. Geo. 4. C. 1. S. 17.

1822.

Savannah against Platten.

do here case. Under the former Provincial Statute an application like the present might have been entertained, because, by that statute, the declaration upon common process was attached to the writ, and the party could form an opinion of the nature of the action, and be prepared to cross-examine his opponent's witness.

Boulton, Justice.—The statute evidently shews a discretion in the court.—The plaintiff's counsel must know that there can be no such thing as issuing a commission where there are no proceedings.

Per Curiam. This application cannot be granted: When the Plaintiff has filed his declaration, he may apply to a Judge at Chambers.

July 19th.

BAYMAN *Against* STRUTHER.

If the Sheriff has returned a writ, though in an informal manner the Court did not grant an attachment against him the first instance.

WASHBURN moved for an attachment against the Sheriff of Johnstown District for not returning a writ of *fieri facias* issued in this cause pursuant to rule.—He stated that the Sheriff had sent an informal return to the attorney of Kingston, which had been returned to him.

1823.

Between [illegible] and [illegible].

Chief Justice.—It would be too harsh to issue an attachment under the circumstances which the counsel has stated.—You may take a rule nisi.

Per Curiam. *Rule nisi granted.*

MICKLEJOHN and another *Against* HOLMES.

July 1824.

WASHBURN moved that the plaintiff do give security for costs upon an affidavit, stating that the defendant had left this Province, and was now residing in Lower Canada, if not lately departed thence for London.

Where a plaintiff has left the Province the affidavit requiring security for costs should state that he has become a stationary resident in a foreign jurisdiction.

Chief Justice.—The affidavits usually state that the party has become a stationary resident in the foreign jurisdiction.—This affidavit is not sufficient.

Rule Refused.